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Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-290 ✓

In the Matter of

Amendment of Section 76.51
of the Commission's Rules
to include Newton, New Jersey,
and Riverhead, New York,
in the New York, New York-
Linden-Paterson-Newark,
New Jersey, Television Market

NOTICE OF PROPOSED RULE MAKING

Adopted: November 4, 1993; Released: November 16, 1993

Comment Date: December 20, 1993

Reply Comment Date: January 4, 1994

By the Chief, Mass Media Bureau:

1. Before the Commission is a petition for rule making filed June 14, 1993, by Mountain Broadcasting Corporation ("Mountain"), licensee of television station WMBC-TV, Channel 63 (Independent), Newton, New Jersey. Mountain seeks to amend Section 76.51 of the Commission's Rules, 47 C.F.R. §76.51, to change the designation of the New York, New York-Linden-Paterson-Newark, New Jersey, television market to "New York, New York-Linden-Paterson-Newark-Newton, New Jersey."¹ Also before the Commission is a petition for rule making filed July 14, 1993, by WLIG-TV, Inc. ("WLIG"), licensee of WLIG(TV),

Channel 55 (Independent), Riverhead, New York, which seeks to add the community of Riverhead to the subject television market.²

BACKGROUND

2. Section 76.51 of the Commission's Rules enumerates the top 100 television markets and the designated communities within those markets. Among other things, this market list is used to determine territorial exclusivity rights under Section 73.658(m) and helps define the scope of compulsory copyright license liability for cable operators. See 47 CFR §76.658(m) and 17 U.S.C. §111(f). Some of the markets consist of more than one named community (a "hyphenated market"). Such "hyphenation" of a market is based on the premise that stations licensed to any of the named communities in the hyphenated market do, in fact, compete with all stations licensed to such communities. See *CATV-Non Network Agreements*, 46 FCC 2d 892, 898 (1974). Market hyphenation "helps equalize competition" where portions of the market are located beyond the Grade B contours of some stations in the area yet the stations compete for economic support. See *Cable Television Report & Order*, 36 FCC 2d 143, 176 (1972).

3. In evaluating past requests for hyphenation of a market, the Commission has considered the following factors as relevant to its examination: (1) the distance between the existing designated communities and the community proposed to be added to the designation; (2) whether cable carriage, if afforded to the subject station, would extend to areas beyond its Grade B signal coverage area; (3) the presence of a clear showing of a particularized need by the station requesting the change of market designation; and (4) an indication of benefit to the public from the proposed change. Each of these factors helps the Commission to evaluate individual market conditions consistent "with the underlying competitive purpose of the market hyphenation rule to delineate areas where stations can and do, both actually and logically, compete."³

4. Section 4 of the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act"),⁴ which amended Section 614 of the Communications Act of 1934, as amended ("Act"), 47 U.S.C. §614, requires the Commission to make revisions needed to update the list of top 100

¹ The Commission has delegated to the Chief, Mass Media Bureau, authority to act on petitions for rule making seeking market redesignation and has stated that it expects "that requests for specific hyphenated market changes that appear worthy of consideration will be routinely docketed and issued as rulemaking proposals." See *Report and Order* in MM Docket No. 92-259 (Broadcast Signal Carriage Issues), 8 FCC Rcd 2965, 2977-78, n.150 (1993).

² Also pending before the Commission are various petitions for special relief involving the New York Area of Dominant Influence (ADI). For example, on May 28, 1993, Cablevision Systems Corporation ("Cablevision"), a cable operator with systems serving various communities within the New York ADI, filed a Petition for Special Relief (CSR-3873-A) requesting, among other things, modification of the ADI markets of WMBC-TV, Newton, NJ, and WLIG, Riverhead, NY, for must-carry purposes. Specifically, Cablevision seeks to exclude these stations from its must-carry obligations on those systems within the New York ADI that are alleged to be geographically remote, socially and politically distinct, and where viewership is negligible or nonexistent. Cablevision seeks to exclude WMBC-TV from mandatory carriage on certain of its New York and Connecticut

systems, and seeks to exclude WLIG(TV) from mandatory carriage on certain of its New Jersey, New York, and Connecticut systems; Cablevision does not seek to exclude these stations from carriage on systems within the ADI that are more proximate to the subject stations' communities or that have historically carried the stations. Thus, while the Cablevision petition is directed to the must-carry status of these stations with regard to specific communities and certain systems within the ADI, the Mountain and WLIG petitions are instead directed to the copyright status of the stations if carried by market-area systems. Any action to amend Section 76.51 of the Rules as proposed is, in our view, without prejudice to Cablevision's efforts to defeat the must-carry status of these stations on certain specific systems within the subject ADI. An appropriate disposition of pending petitions for special relief, including Cablevision's and others', are proceeding on a separate track.

³ See, e.g., *TV 14, Inc. (Rome, Ga.)*, 7 FCC Rcd 8591, 8592 (1992), citing *Major Television Markets (Fresno-Visalia, California)*, 57 RR 2d 1122, 1124 (1985). See also *Press Broadcasting Company, Inc.*, 8 FCC Rcd 94, 95 (1993).

⁴ Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

television markets and their designated communities in Section 76.51 of the Commission's Rules. See Section 614(f) of the Act.⁵ The Commission stated that where sufficient evidence has been presented tending to demonstrate commonality between the proposed community to be added to a market designation and the market as a whole, such cases will be considered under an expedited rulemaking procedure consisting of the issuance of a Notice of Proposed Rule Making based on the submitted petition.

THE MOUNTAIN PETITION: Newton, NJ

5. Mountain maintains that amendment of Section 76.51 of the Rules to include the community of Newton as a designated community in the subject television market is essential to make that rule comport with market realities. It states that Newton is less than 45 miles from, and that WMBC-TV's Grade B signal contour reaches a substantial portion of, all the currently designated communities in the market.⁶ Moreover, Mountain asserts, WMBC-TV's Grade B contour significantly overlaps those of the commercial broadcasting stations licensed to the presently designated communities in the market, and that all but five of the twenty-two television stations in the subject ADI provide Grade B or better service to Newton.⁷ Mountain also asserts that its competitive position in the market is further verified by Arbitron's inclusion of WMBC-TV as part of the New York ADI.

6. Mountain further alleges that the proposed rule amendment is critical to facilitate competition between WMBC-TV, a recently built UHF station, and other stations in the market with respect to carriage on market-area cable systems. It states that without such a rule change, it is unlikely that WMBC-TV will be carried on many of the cable systems in the station's ADI. Mountain relates that despite the fact that WMBC-TV has mandatory signal rights throughout the ADI, because Newton is not a designated community in the Section 76.51 market listings, the station is not considered a "local signal" for copyright purposes throughout the New York ADI in which it competes. While stations licensed to communities specifically designated in Section 76.51 are considered local for all cable systems within the 35-mile zones of all listed communities in a given hyphenated market, the absence of Newton as a designated community in this market list results in WMBC-TV's classification as a "distant signal" for market-area cable systems more than 35 miles from Newton. In this regard, Mountain states that it has received notices

from various cable systems within the New York ADI advising that, pursuant to Section 76.58(d) of the Commission's Rules, they will not provide mandatory carriage of WMBC-TV unless the station agrees to reimburse over nine million dollars semi-annually in copyright royalty fees.⁸ Mountain alleges that the estimated copyright costs for cable carriage "are so staggering that WMBC-TV is, in effect, prohibited from exercising its must-carry rights."

7. Mountain further contends that WMBC-TV will be at a severe competitive disadvantage unless accorded the same mandatory carriage status as the other stations licensed to communities in the subject hyphenated market. Mountain asserts that the fact that WMBC-TV is a new UHF independent station increases its competitive burden, and maintains that lost revenues resulting from WMBC-TV's limited access to viewers will jeopardize the continued survival of the station. Mountain asserts that, on the other hand, amendment of the market as proposed will greatly benefit the viewing public in the market. It maintains that WMBC-TV's news, local public affairs and independent program offerings contribute to the diversity of the market as a whole, and to New Jersey viewers in particular. Therefore, it asserts that redesignation of the market as proposed will not only place WMBC-TV on a level playing field with its competitors, but will also comport with the goal of assuring that local stations have access to cable subscribers and that subscribers have access to all stations in a television market. By amending the market as proposed, Mountain concludes that it will gain an equal competitive footing to gain the same access to viewers in the market enjoyed by other area stations.

THE WLIG PETITION: Riverhead, NY

8. In its petition, WLIG alleges that amendment of Section 76.51 of the Rules to include the community of Riverhead as a designated community in the subject market is critical to equalize competition between WLIG(TV) and other market-area stations. It notes that WLIG(TV) began operations in April, 1985, and is the only full-time independent station licensed to serve a Long Island community. WLIG further states that WLIG(TV) is part of the Arbitron-defined New York ADI "for TV sales, promotion, audience measurement, and programming purposes." It asserts that the station's programming and economic bases are ADI-wide in scope and directed to the tri-state interests and concerns of New York, New Jersey and Connecticut residents. WLIG states that despite the fact that the station operates in the largest television market in the country, its

⁵ In connection with the implementation of the broadcast signal carriage provisions of the Cable Act, the Commission concluded that a major update of Section 76.51 was not necessary based on the record then before it. Nevertheless, the Commission did make some minor revisions to Section 76.51 of the Rules, and announced that it would consider further revisions to the list of television markets on a case-by-case basis. See *Report and Order* in MM Docket No. 92-259, *supra*.

⁶ Mountain states that its proposed change to Section 76.51 of the Rules will not greatly extend its access to viewers beyond WMBC-TV's Grade B signal contour. Moreover, citing *Report & Order* in MM Docket No. 84-111 (Melbourne and Cocoa, Florida) 57 RR 2d 685, 692 (1985), Mountain asserts that "some extension of rights into areas beyond a station's Grade B contour is permissible in a hyphenated market as long as the station largely gain[s] such rights in a significant area within that contour."

⁷ Mountain states that ADI market stations WHAI(TV), Bridgeport, Connecticut, WTZA(TV), Kingston, WLIG(TV), Riverhead, WHSI(TV), Smithtown, and WTBY(TV), Poughkeepsie, New York, fail to provide Grade B or better service to Newton.

⁸ Section 76.58(d) of the Commission's Rules required a cable operator to notify all local television stations by May 3, 1993, that they may not be entitled to mandatory carriage on the system because such carriage may cause an increased copyright liability to the cable system. Under the provisions of Section 76.55(c)(2) of the Rules, a local commercial television station otherwise entitled to mandatory carriage need not be carried on market-area cable systems if the station is considered a "distant signal" under the copyright compulsory license (17 U.S.C. §111) and the station does not agree to indemnify the cable operator for the increased copyright liability. See *Report and Order* in MM Docket No. 92-259, 8 FCC Rcd at 2973-74.

advertising has continued to be local, with only nominal national advertising revenues. In contrast, WLIG alleges that WCBS-TV -- the New York City station with the best Grade B signal coverage to Long Island -- attracts far more national advertisers "buying" Long Island, despite WLIG(TV)'s superior signal coverage to those areas. Thus, WLIG contends that amendment of Section 76.51 as proposed will equalize competition between WLIG(TV) and the New York City stations for programming, national advertising and audience while allowing the public to benefit from greater program diversity.⁹

9. In support of the proposed rule amendment, WLIG states that the 35-mile zone of WLIG(TV) intersects the 35-mile zone of the New York City television stations, but does not intersect the 35-mile zones of the New Jersey communities at the "extreme ends" of the market.¹⁰ Further, it states that the Grade B signal contour of WCBS-TV ("as a representative New York City station") reaches within 10 miles of Riverhead, while WLIG(TV)'s Grade B contour encompasses a section of Queens, a part of New York City.¹¹ WLIG asserts that such overlapping contours "help demonstrate that the stations involved are components of the same TV market" in that they "rely on the area within their Grade B contours for economic support."

10. WLIG also asserts that its "particularized need" for the requested relief is based on the fact that while WLIG(TV)'s service area is an integral part of the New York ADI, the station cannot compete on an equal footing with the New York City stations for programming, national advertising and audience "because Riverhead is not recognized as being part of Market #1 or ADI #1." It reiterates that although the Long Island coverage areas of the New York City stations largely overlap WLIG(TV)'s coverage area, the fact that WLIG(TV) receives far less of the national advertising demonstrates the station's inequitable competitive position. Such a competitive disadvantage, in WLIG's view, is "exactly what the Commission has sought to cure via market hyphenations."

11. WLIG further states that addition of Riverhead to the Section 76.51 market listings will resolve a substantial problem created by the interplay of the different regulatory schemes for must-carry and program exclusivity. WLIG states that because Riverhead is more than 35 miles away from New York City, WLIG(TV) cannot obtain exclusivity for programming against New York City stations. As such, cable systems inside the New York City 35-mile zone will be entitled to assert exclusivity protection against

duplicative syndicated programming broadcast by WLIG(TV), even though both stations have must-carry rights on such system. By adding Riverhead to the market as proposed, WLIG states that it will be permitted to purchase program exclusivity against the New York City stations, thereby eliminating the potential for syndicated exclusivity blackouts between must-carry stations. Additionally, WLIG contends that the absence of Riverhead as a designated community in the market results in WLIG(TV) being considered a "distant signal" under the compulsory copyright license.¹² Therefore, it asserts, in those instances where a cable system is located within the New York ADI but beyond Riverhead's 35-mile zone, WLIG(TV) ceases to become a must-carry station unless the station agrees to indemnify that system for increased copyright liability.

12. WLIG concludes that amendment of Section 76.51 as proposed will permit WLIG(TV) to overcome the competitive disadvantage the station faces "because its present market designation is not commensurate with its coverage area and its physical and economic location within the New York - New Jersey major market and the New York ADI." It asserts that the grant of its petition will enable it to significantly increase its news, public affairs and other non-entertainment programming to the benefit of the viewing audience throughout the market.

DISCUSSION

13. Based on the facts presented, we believe that sufficient cases for redesignation of the subject market have been set forth so that these proposals should be tested through individual rulemaking proceedings, including the comments of interested parties. It appears from the information before us that WMBC-TV and WLIG(TV) and stations licensed to communities in the New York, New York-Linden-Paterson-Newark, New Jersey, television market do compete for audiences and advertisers throughout much of the proposed combined market area, and that evidence has been presented tending to demonstrate commonality between the proposed community to be added to a market designation and the market as a whole.¹³ Moreover, these proposals appear to be consistent with the Commission's policies regarding redesignation of a hyphenated television market.

14. Although we believe the specific proposals submitted warrant testing through the rulemaking process, this is a particularly large and complex market situation for which

⁹ In this regard, WLIG notes that its petition is directed to the New York ADI as a whole, and is not intended to address the issue of national and regional cable advertising on Long Island, issues that are the subject of a civil antitrust complaint it has filed against Cablevision in the United States District Court for the Eastern District of New York (Case No. CV-93-3019), and also a complaint it has filed with the Commission regarding Cablevision's compliance with the must-carry rules.

¹⁰ WLIG states that its case is analogous to the Commission's action in *Report & Order* in MM Docket No. 84-111, *supra*, where the Commission evaluated, among other things, "whether most of the area where a station licensed to the proposed community would be afforded expanded carriage rights lies beyond its Grade B contours." It notes that because WLIG(TV)'s mandatory cable carriage rights derive from its location within the New York ADI -- not from the proposed hyphenation -- the addition of Riverhead as a designated community in Section 76.51 of the Rules will not increase the station's must-carry rights beyond that which the Rules already permit.

¹¹ From the information attached to WLIG's petition, it appears that the Grade B signal contours of WLIG(TV) and WCBS-TV overlap along the western and middle portions of Long Island, and the Grade B signals of WLIG(TV) and WNJU(TV), Linden, New Jersey ("as a representative New Jersey station") overlap, to a lesser extent, over the same general area.

¹² See discussion at paragraph 6 and footnote 8, *supra*.

¹³ Our conclusion that WLIG's petition is sufficient to initiate a rule making proceeding on its proposal consistent with the *Report & Order* in MM Docket No. 92-259, *supra*, is without regard to the fact that its petition is premised, in part, on program exclusivity and competition issues that are among those matters presently under consideration in *Further Notice of Proposed Rulemaking* in Gen. Docket No. 87-24, 3 FCC Rcd 6171 (1988). Interested parties may wish to direct comment to this aspect of WLIG's proposal. See discussion at paragraph 14, *infra*.

adjustment is sought. We thus believe it may be useful to consider several alternative possibilities. First, we solicit comment on other mechanisms short of market hyphenation that might address some of the problems that WLIG has expressed concerning operation under the existing rules. In particular, WLIG has indicated that it cannot obtain exclusivity vis-a-vis stations in New York City because of the territorial exclusivity provisions of the rules (Section 73.658) that generally preclude stations in different markets from obtaining exclusivity against each other.¹⁴ This rule was intended to protect a station such as WLIG, and the Commission has previously waived the rule when it was found to be interfering with rather than assisting its intended beneficiaries. *See Press Television Corp.*, 4 FCC Rcd 8799 (1989), *aff'd on recon.* 6 FCC Rcd 6563 (1991). Thus, we seek comment on the possibility of such a waiver in this context if it is determined that market hyphenation is inappropriate.

15. Second, although no petitions have been received seeking their inclusion as part of this hyphenated market, we seek comment on whether there are additional communities to which stations are licensed that may also warrant hyphenation along with Newton and/or Riverhead. We seek comment on this possibility in order to address potential anomalies associated with having some but not all of the stations in an ADI market included as hyphenated "designated" communities in the market. There is, for example, the potential anomaly of having an unhyphenated community in the midst of a hyphenated market. For example, Smithtown, New York, to which WHSI-TV is licensed and which is not now a hyphenated community in the New York City market, is a Long Island community considerably closer to New York City than is Riverhead. Newton is considerably more distant from New York City than is Secaucus, New Jersey to which WWOR-TV is licensed. Accordingly, we seek specific comment on whether one or more of the following communities should also be included in Section 76.51 as designated communities in the market: Secaucus, Bridgeport, Poughkeepsie, Kingston, Smithtown.¹⁵

16. Third, we solicit comment on the possibility of only partially "hyphenating" the market so that, for example, Riverhead might be included with New York City in a common market and Newton included with New York City but Riverhead and Newton not joined as part of a common market designation. Such a partial hyphenation might be a potential means of including together stations truly competitive with each other without so treating stations at opposite ends of a large ADI market area.¹⁶

¹⁴ Section 73.658(m) of the Commission's Rules essentially prohibits exclusivity agreements that effect other television stations located in communities over 35 miles distant, except that stations may secure exclusivity against other stations licensed to another designated community in a hyphenated market specified in Section 76.51.

¹⁵ Together with New York City, Newton, and Riverhead, these communities are included in the subject ADI by Arbitron. Moreover in this regard, we note that we have previously declined to include communities to a market unless they were specifically under consideration for redesignation pursuant to the issuance of a Notice of Proposed Rule Making ("NPRM"). *See, e.g., Report and Order* in MM Docket No. 92-259, *supra* at 2978, n.149; *Press Broadcasting Company, Inc.*, 8 FCC Rcd 3667,

ADMINISTRATIVE MATTERS

Ex Parte Rules -- Non-Restricted Proceeding

17. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, provided they are disclosed as provided in the Commission's Rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203 and 1.1206(a).

Comment Information

18. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before December 20, 1993, and reply comments on or before January 4, 1994. All relevant and timely comments will be considered before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

Initial Regulatory Flexibility Analysis

19. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because if the proposed rule amendment is promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601 (3) of the Regulatory Flexibility Act. A few cable television system operators will be affected by the proposed rule amendment. The Secretary shall send a copy of this *Notice of Proposed Rule Making*, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

Additional Information

20. For additional information on this proceeding, contact Alan E. Aronowitz, Mass Media Bureau, (202)632-7792.

n.1 (1993). In those cases, an NPRM was issued soliciting public comment on a proposal involving a specific community. However, due to the nature of this particular proceeding, the size and complexity of the market involved, and the two inter-related, but independent, NPRM requests now before the Commission, we believe it is appropriate to solicit comment regarding the impact of these proposals on other communities in the market.

¹⁶ This is a problem that has long been recognized but for which no fully satisfactory general solution has been developed. *See, e.g., Further Notice of Proposed Rulemaking* in Docket 18397, 22 FCC 2d 603, 607 (1969) (Suggesting possibility of hyphenation of some communities resulting in the creation of only a single market zone.)

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
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